Supreme Court, U.S.
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No. 98-418

In The

Supreme Court of the United States

October Term, 1998

WYOMING DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

BEVERLY A. STRAIGHT

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

In unambiguously abrogating states' Eleventh Amendment immunity in proceedings brought pursuant to 11 U.S.C. §§ 362 & 525(a), did Congress validly legislate pursuant to the Fourteenth Amendment?

II

Did Wyoming waive its Eleventh Amendment immunity from section 362 and 525 proceedings which arose "out of the same transaction or occurrence" as the proof of claim one of its agencies filed against the bankruptcy estate?

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Petitioner's statement is accurate, as far as it goes. It nevertheless omits some crucial facts as found by the bankruptcy and district courts, and left undisturbed by the court of appeals.

The bankruptcy proceedings at issue here arose after Beverly Straight filed her Chapter 13 petition on January 13, 1995. Within a month, she received a letter from the Wyoming Department of Transportation (DOT) indicating its intent to decertify her from participation in Wyoming's Disadvantaged Business Enterprise (DBE) program as a highway flagging contractor. This February 10, 1995, communication asserted that the reason for the proposed action was that "[b]y filing for Chapter 13 bankruptcy, you have lost the ability to control your business; that control now lies in the hands of the Bankruptcy Court and the Bankruptcy Trustee." Pet. 5. The attorney for Ms. Straight informed Wyoming DOT on March 14, 1995, that under Chapter 13 bankruptcy she did have continuing control of her business, and, more importantly, that Wyoming DOT's contemplated decertification would violate 11 U.S.C. § 525, which prohibits a government entity from discriminating against an individual, in the "denial" or "revocation" of a "license, permit," or "similar grant," solely on account of the individual's filing for bankruptcy.

Despite this warning, Wyoming DOT's decertification became final on March 28, 1995, and a letter of that date from Wyoming DOT indicated also that Ms. Straight did not "possess the financial and bonding resources necessary to

operate the business in its field of work." Pet App. 62a. The bankruptcy court found, however, that Ms. Straight had offered evidence of bonding. Id.

On February 27 and March 24, 1995, the Wyoming Department of Employment and Wyoming Workers' Compensation Division filed proofs of claim in the amounts of $2,474.88 and $27,597.42 respectively, as unpaid unemployment taxes and workers' compensation premiums.

On July 25, 1995, Ms. Straight filed a motion for an order to show cause, and for a contempt citation to issue for Wyoming's violation of the automatic stay imposed under 11 U.S.C. § 362, and of the non-discrimination provision of section 525. Straight also sought damages for the loss of contracts she incurred because of Wyoming DOT's withdrawal of her DBE status. See Pet. App. 63a.

In responses to this motion, Wyoming replied that it had not decertified Ms. Straight because of her bankruptcy filing, but, rather, because of the "amount of unpaid payroll liability owed by the Debtor. . . ." Pet App. 24a; see also Pet. App. 20a (where Wyoming referred to Ms. Straight's "accrued payroll taxes"). As both the district court and Tenth Circuit ruled, Pet App. 10a-11a, 58a, in its desire to disavow its admission that it had violated the non-discrimination provision of 11 U.S.C. § 525, it was *Wyoming* that raised the connection between Ms. Straight's owing of payroll taxes (which had been the subject of Wyoming's proofs of claim) and the DBE decertification (the subject of the proceedings brought by Straight). Wyoming thus seeks this Court's review in order to cure its own concession in this case.

REASONS FOR DENYING THE WRIT

1. Respondent questions Wyoming's assertion that there is a genuine split in circuit authority on the constitutionality of 11 U.S.C. § 106(b) (1997). That provision simply articulates a standard of waiver of state Eleventh Amendment immunity from compulsory counterclaims arising from the same transaction or occurrence as the proof of claim that a state filed against a bankruptcy estate. While Respondent grants that the Tenth Circuit, in the opinion below, Pet App. 11a-13a, did uphold the constitutionality of that provision, it is by no means clear that any court of appeals has expressly held § 106(b) as violative of the Eleventh Amendment.[1]

Indeed, section 106(b) has been consistently understood by the courts of appeals following *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), as merely a codification of this Court's common law understanding that a state waives its sovereign immunity in federal bankruptcy proceedings when it appears to press a claim. See also *In re Burke*, 146 F.3d 1313, 1317-20 (11th Cir. 1998); *In re Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998); *Texas v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998); *AER-Aerotron v. Texas Dep't of Transp.*, 104 F.3d 677, 681, 683 (4th Cir. 1997).

[1] *In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir. 1997), is doubtful as an unqualified rejection of the constitutionality of section 106(b). In that case, the statutory predicates for the assertion of waiver under that provision had not been satisfied. See id. at 1149 ("The trustee's action in this case . . . does not arise out of the same transaction or occurrence supporting Maryland's proof of claim for unrelated taxes."). The Fourth Circuit also acknowledged that, notwithstanding its dicta on the constitutionality of § 106(b), that provision "may correctly describe those actions that, as a matter of constitutional law, constitute a waiver of the Eleventh Amendment." See id. at 1147.

Respondent disagrees with Wyoming's suggestion that these cases -- including the decision from which review is sought here -- are an untoward expansion of this Court's long-standing articulation of the scope of that waiver. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), this Court noted that

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. . . . When the State becomes the actor and files a claim against the fund, it waives any immunity it might otherwise have had respecting the adjudication of the claim.

Id. at 573-74. This confirmed this Court's earlier observation that "[i]f a state desires to participate in the assets of a bankrupt, she must submit to the appropriate requirements of the controlling authority. . . ." *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933); see also *Clark v. Barnard*, 108 U.S. 436, 448 (1883).

Wyoming's interpretation is that *Gardner* allows a state to waive its immunity only as to the disposition of the claim it files, but not as to any compulsory counterclaim the debtor or bankruptcy estate might have. This limiting construction is unsupported by the language of *Gardner*. More importantly, to the extent that § 106(b) may actually codify a higher threshold than *Gardner* -- by requiring (1) that a state file an actual proof of claim, (2) that the counterclaim made by the debtor be the "property of the [bankruptcy] estate," and (3) that it arise from the "same transaction or occurrence" as the state claim -- any criticism of section 106(b) is quite unwarranted.

Upon closer examination, the circuit split that Wyoming complains of is quite illusory. The courts of appeal have, since this Court's decision in *Seminole Tribe*, carefully and narrowly recognized that states may waive their Eleventh Amendment immunity in federal bankruptcy proceedings when they engage in particular litigation conduct.

2. Realizing that there is no real division in circuits on the constitutionality of § 106(b), Wyoming has chosen to hedge its bets by raising questions of the proper construction of that provision. These inquiries seem to assume that § 106(b) is, in fact, a constitutional codification of long-standing common law waiver principles in bankruptcy. Respondent would suggest that, quite apart from Wyoming's inappropriate bundling of constitutional and statutory questions in the same Petition, these issues are not really ready for Supreme Court review. Moreover, this case is not an appropriate vehicle to resolve the ancillary problems raised in the situational -- and fact-dependent -- application of section 106(b)'s requirements.

a. Respondent understands Petitioner to argue that the Tenth Circuit erred in its ruling that Wyoming should be treated as a single entity, for purposes of establishing that a proof of claim filed against the Straight estate by the Wyoming Department of Employment acted as a waiver of Straight's counterclaim against Wyoming DOT. Petitioner suggests that the problem of statutory interpretation implicated here -- the meaning of the phrase "such governmental unit" in § 106(b) -- has a constitutional dimension and must be resolved in reference to a canon of construction requiring that statutory waivers of state sovereign immunity must be unambiguous.

Respondent doubts, however, whether § 106(b) is properly understood as a statutory waiver of sovereign

immunity, and thus subject to the canon mentioned in the cases upon which Wyoming relies. Pet. 12. Instead, section 106(b) should be regarded as a codification of the common law conditions in which a sovereign -- by its litigation conduct in a bankruptcy proceeding -- will be deemed to have waived its immunity from compulsory counterclaims arising from the sovereign's own claims.

Wyoming complains also that the Tenth Circuit failed to recognize that the meaning of "such governmental unit" is inherently ambiguous. Petitioner actually faults the court below for referring to Wyoming's own law for its ruling that Wyoming considers itself a unitary creditor, a conclusion that Petitioner apparently does not dispute here. This issue might be appropriate for review had the court of appeals misapplied controlling principles of state or federal law regarding a governmental entity's unitary creditor status, but the Tenth Circuit did not commit that error. Wyoming is thus left to quibble that the court of appeals failed to apply a canon of construction that has only dubious applicability to this case.

Wyoming has also failed on this point to establish any compelling need for the Court to establish a standard for when a governmental entity will be treated as a unitary creditor. The decision below appears to be the first by a court of appeals to address this particular matter. Nor is it by any means clear that any bankruptcy court has taken a position contrary to that ruled by the Tenth Circuit.[2]

[2] Of the cases relied upon by Petitioner to raise this conflict, Pet. 13 n.6, two (*In re Leeth Constr. Co.*, 170 B.R. 684, 685 (Bankr. D.Ariz. 1994) and *In re R & W Enter.*, 181 B.R. 624, 639 (Bankr. N.D.Fla. 1994)) involve the United States as a unitary creditor – a question that may be analytically distinct from the status of state entities. One case (*In re Four Seasons Care Ctrs.*, 119 B.R. 681, 683-84 (Bankr. D.Minn. 1990)), was decided prior to the amendment of the current version of § 106(b), and the earlier statute's omission of a

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b. The other ground for review raised by Wyoming is that the Tenth Circuit improperly applied the "same transaction or occurrence" test to the facts of this case. Wyoming appears to concede that the court of appeals applied the proper analysis of Fed. R. Civ. P. 13(a) for determining compulsory counterclaims. Moreover, Petitioner agrees that the courts of appeals have generally applied the Fed. R. Civ. P. 13(a) standard to determine when a debtor's counterclaim arises from the "same transaction or occurrence" as the proof of claim filed by a state.

Wyoming declines to articulate an alternative standard to be applied by the courts in these cases. Indeed, it cannot proffer such a standard, since such determinations are intimately connected with the factual context of a state's proof of claim and the debtor's counterclaim. Wyoming is extravagant to suggest that the Tenth Circuit ruled that any counterclaim arising from Respondent's business would have been covered by Wyoming's waiver. In truth, Wyoming seeks this Court's review simply to alter a factual conclusion made by the bankruptcy and district courts, and left undisturbed on appeal: that it was *Wyoming* which argued that the Wyoming DOT's revocation of Ms. Straight's DBE certificate was related to her non-payment of employment taxes.

3. Respondent trusts that these intimations will persuade the Court that this case is unworthy of plenary review. If, however, this Court is nevertheless disposed to

[2](...continued)
"same transaction or occurrence" standard was found to be dispositive. The last two cases (*In re William Ross, Inc.*, 199 B.R. 551, 555 (Bankr. W.D. Pa. 1996) and *In re Rocchio & Sons, Inc.*, 165 B.R. 86, 87 (Bankr. D.R.I. 1994)), did not reach the unitary creditor issue, but ruled, instead, that the debtor had failed to show that its counterclaim arose from the "same transaction or occurrence" as the proof of claim filed by a state entity.

grant the Petition, there is a threshold issue that may require the Court's attention. Respondent raised below an argument that Congress had validly *abrogated* Wyoming's Eleventh Amendment immunity when it legislated 11 U.S.C. § 106(a).[3] Respondent argued below that this abrogation of Eleventh Amendment immunity was unequivocally expressed by Congress, and, to the extent that it concerned enforcement of the non-discrimination and automatic stay provisions of the Bankruptcy Code, 11 U.S.C. §§ 362 & 525, was enacted pursuant to the Fourteenth Amendment.

This argument was accepted by both the bankruptcy court, Pet. App. 65a, and by the district court. Pet. App. 28a-52a. It was renewed before the Tenth Circuit, see Pet. App. 5a, but that court chose not to address it.[4] Respondent

[3] 11 U.S.C. § 106(a) (1997) provides in pertinent part that "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . with respect to the following: (1) Sections . . . 362 . . . [and] 525 . . . of this title." Id.

[4] Whether § 106(a) was a valid abrogation of states' Eleventh Amendment immunity under the Fourteenth Amendment has been considered by a number of courts of appeals. Most, relying on language in this Court's *Seminole Tribe* decision, 116 S.Ct. 1114, 1131-32 n.16, and the reasoning of *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), have held that § 106(a) could only have been legislated pursuant to the Bankruptcy Clause of Article I and otherwise exhibits no Fourteenth Amendment concerns. See *In re Creative Goldsmiths*, 119 F.3d at 1144-47; *In re Fernandez*, 130 F.3d 1138, 1139 (5th Cir. 1997); *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 243-45 (3d Cir. 1998).

None of these cases, however, concerned a bankruptcy proceeding brought pursuant to 11 U.S.C. § 525, which provides that

> a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor. . . solely because such bankrupt or debtor is or has been a debtor. . . .

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is clearly entitled to raise the abrogation argument as another ground for affirmance, and wishes to reserve its right to do so. Nevertheless, the Court may wish to instruct the parties as to whether it wishes briefing on this subject, and thus to revise the Questions Presented offered by Wyoming.

[4](...continued)

11 U.S.C. § 525(a). Respondent is prepared to argue that it is within Congress' power, under the Equal Protection Clause, to remedy governmental discrimination against individuals solely on account of their bankruptcy status by making that government amenable to suit in a federal bankruptcy proceeding.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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